

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 28, 2005 appellant, then a 52-year-old database administrator, filed a traumatic injury claim alleging that he slipped on a wet floor in a men's restroom while in the performance of duty. On November 18, 2005 OWCP accepted his claim for acute lumbar sprain/strain. Appellant underwent an L4-5, L5-S1 transforaminal lumbar interbody fusion and L4-5, S1 posterior fusion on January 12, 2007. OWCP paid compensation benefits beginning April 16, 2007. On April 18, 2007 appellant completed a direct deposit sign-up form. He returned to light-duty work on February 20, 2008. On April 7, 2008 OWCP accepted that appellant sustained a recurrence of disability on March 16, 2008. In a letter dated June 18, 2008, OWCP entered him on the periodic rolls. This letter included the statement:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through [OWCP's] automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to [OWCP]. Otherwise, an overpayment of compensation may result.” (Emphasis in the original.)

Appellant underwent additional surgery on September 12, 2008.

The employing establishment offered appellant a position on November 1, 2010. Appellant returned to work on January 3, 2011. He notified OWCP on January 18, 2011.

In a letter dated March 11, 2011, OWCP made a preliminary determination that appellant had received an overpayment of \$2,560.29 because he returned to work on January 3, 2011 and continued to receive compensation for temporary total disability through January 15, 2011. It stated that he was entitled to compensation for temporary total disability from December 19, 2010 through January 2, 2011 in the net amount of \$2,954.19, but that he received compensation for the period December 19, 2010 through January 15, 2011 in the amount of \$5,514.48 receiving an overpayment of \$2,560.29. OWCP concluded that appellant was at fault because he accepted a payment which he knew or reasonably should have known was incorrect. It requested that he provide financial information. Appellant did not respond within the allotted time.

By decision dated May 5, 2011, OWCP determined that appellant received an overpayment for the period January 3 through 15, 2011 in the amount of \$2,560.29 for which he was at fault. It noted that he had not responded to the preliminary determination with the requested financial information requested full payment within 30 days.²

² The Board notes that the record contains additional information regarding the results of appellant's third-party suit. However, as this information was not before OWCP at the time of the May 5, 2011 decision, the Board cannot consider this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁵ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

ANALYSIS -- ISSUE 1

Appellant returned to work on January 3, 2011. He continued to receive compensation benefits for total disability through January 15, 2011. Any wage-loss compensation appellant received from OWCP after January 2, 2011 constitutes an overpayment of compensation.⁸ The record shows that OWCP paid him wage-loss compensation until January 15, 2011. Thus, he received an overpayment consisting of the difference between the amount he received, \$5,514.48 and the amount to which he was entitled, \$2,954.19, resulting in an overpayment of \$2,560.29. The Board will affirm the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁹ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be

³ 5 U.S.C. §§ 8101-8193, 8102.

⁴ *Id.*

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

⁹ 5 U.S.C. §§ 8101-8193, 8129(a).

against equity and good conscience.”¹⁰ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP’s regulations¹¹ provide in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹² It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault in the creation of the \$2,560.29 overpayment.

An overpayment of compensation occurred in this case when appellant returned to full-time work on January 3, 2011 and received compensation for temporary total disability for the period December 19, 2010 through January 15, 2011. The compensation check thus covered two periods: a period of total disability through January 3, 2011, for which he remained entitled to compensation and a period of full-time employment from January 3 through 15, 2011 for which he was not entitled to compensation. It is during this latter period that the overpayment occurred.

¹⁰ *Id.* at § 8129(b).

¹¹ 20 C.F.R. § 10.320(b).

¹² *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹³ *See K.H.*, Docket No. 06-191 (issued October 20, 2006).

OWCP found that appellant was at fault in the creation of the overpayment based on the fact that he accepted a payment which he knew or should have known to be incorrect. This case, however, is distinguishable from those in which a claimant returns to work, subsequently receives a compensation check in the mail covering a period of employment, and knows or should have known that he is not entitled to such compensation, but decides nonetheless to cash or deposit the check. In such cases, the cashing or depositing of the check constitutes acceptance.¹⁴ In this case, appellant authorized OWCP to deposit his compensation directly to his bank account. After he notified OWCP of his return to work on January 18, 2011, he received a direct deposit to his account. Under the facts of this case, appellant had no opportunity to make a decision as to the correctness of the check before it was deposited to his account. While he accepted the overpayment by gaining control of the funds deposited into his bank account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day.¹⁵

The Board finds that under the circumstances of this case OWCP has not presented sufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board will, therefore, set aside OWCP's finding of fault and remand the case to OWCP for further development and a final decision on the issue of waiver.¹⁶

Appellant argued on appeal that the overpayment was recovered from his third-party settlement.¹⁷ The details of the third-party settlement are not properly of record before the Board in this appeal.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,560.29. The Board further finds that appellant was without fault in the creation of the overpayment.

¹⁴ *William F. Salmonson*, 54 ECAB 152 (2002).

¹⁵ *See Tammy Craven*, 57 ECAB 689 (2006); *M.S.*, Docket No. 08-1481 (issued January 27, 2009).

¹⁶ The third issue is rendered moot due to the findings on appeal. The Board notes that with respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to OWCP's recovery of an overpayment under the Debt Collection Act. *See Lewis George*, 45 ECAB 144, 154 (1993); *see also* 20 C.F.R. § 501.2(c)(1).

¹⁷ In a letter dated June 1, 2009, OWCP stated that appellant had sustained an injury under circumstances which may place liability for damages upon a third party. On June 10, 2009 appellant informed OWCP that he had instituted a third-party suit, but had not recovered damages. On March 23, 2011 OWCP informed him that he should make a refund in the amount of \$305,928.11. The record reveals that appellant, through counsel, complied. OWCP acknowledged receipt of the refund on May 16, 2011.

¹⁸ 20 C.F.R. § 501.2.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part for further proceedings consistent with this decision of the Board.

Issued: May 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board